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Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of: **DETERMINATION OF ROYALTY RATES AND TERMS FOR MAKING AND DISTRIBUTING PHONORECORDS (*Phonorecords IV*)**	**Docket No. 21-CRB-0001-PR (2023-2027)**

SERVICES' MOTION FOR PROTECTIVE ORDER TO PREVENT CIRCUMVENTION OF DISCOVERY RULES WITH RESPECT TO DATA IN THE POSSESSION OF THE MECHANICAL LICENSING COLLECTIVE

Pursuant to 17 U.S.C. §§ 801(c), 803(b)(6) and 37 C.F.R. §§ 351.5(b), 351.9(e), Apple Inc., Amazon.com Services LLC, Spotify USA Inc., and Pandora Media, LLC (the "Services") respectfully request that the Copyright Royalty Board Judges issue a Protective Order to prevent the National Music Publishers Association and Nashville Songwriters Association International (collectively "Copyright Owners") from improperly obtaining confidential information of digital services held by the Mechanical Licensing Collective ("MLC")—a nonparticipant—without providing notice to the Service whose confidential information is being sought and the opportunity to object.[1] The Copyright Owners should be required to seek information directly from the participant Services through a written discovery request or to move for a subpoena to obtain information from the MLC, consistent with the CRB's well-established discovery requirements and regulations. The undersigned have conferred with counsel for the Copyright Owners, who have stated that they oppose this motion. Counsel for the Copyright Owners have

[1] Google LLC supports the request for relief set forth in this Motion.

also represented that they intend to continue to obtain confidential service information from the MLC, without resort to discovery requests or subpoenas.[2]

The Services recently learned that the Copyright Owners obtained confidential service information from the MLC in the *Phonorecords III* remand proceeding, and relied on it as part of their submissions in that case, without providing the Services notice and an opportunity to object. In fact, in that case, the information the Copyright Owners obtained from the MLC included information they had sought in discovery from the participating Services and as to which they filed a motion to compel. But apparently while that motion was pending, they simply obtained it from the MLC without providing any notice.[3] In the ordinary course of litigation before the CRB, participants can seek discovery of certain information from participants, like the Services, through the submission of discovery requests at a specified time in the proceeding. The Copyright Act provides "[a] participant in a royalty rate proceeding may request of an opposing participant nonprivileged documents that are directly related to the written direct statement or written rebuttal statement of that participant." 37 C.F.R. § 351.5(b)(1); *see also* 17 U.S.C. § 803(b)(6)(C)(v). Participants can also "move the Copyright Royalty Judges to issue a

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[2] The Copyright Owners offered to stipulate that all participants will provide all other participants with any data that they obtain from either the MLC or the DLC within five business days of its receipt. This, of course, is insufficient as it would not provide the service whose information is being sought notice, an opportunity to object, or a chance to review the Protective Order. Moreover, the Copyright Owners were unable to provide a legitimate reason for the five-day delay. They cited administrative concerns and compared the five-day period to the time provided under the Federal Rules of Civil Procedure to respond to a subpoena, which is inapposite given that the MLC would have already collected the relevant information for the requesting party and the Copyright Owners do not plan to provide an opportunity to object.

[3] We note that Pryor Cashman LLP is the principal outside counsel for the MLC and is counsel to the Copyright Owners in this proceeding, and so has unique access to confidential service information held by the MLC. This dual representation heightens the concerns with allowing Copyright Owners to obtain unfettered access to MLC-held confidential information in this proceeding.

subpoena" to obtain documents from nonparticipants, like the MLC. 37 C.F.R. § 351.9(e); *see also* 17 U.S.C. § 803(b)(6)(C)(ix). And, much like in federal litigation, the entity with the confidentiality interest in the information requested has the right to object and "[a]ny objection to a request for production shall be resolved by a motion or request to compel production." 37 C.F.R. § 351.5(b)(1); *see also* Fed. R. Civ. P. 34(b)(2) (outlining procedure for responding and objecting to discovery requests); Fed. R. Civ. P. 45(d)(2)(B) (outlining procedure for objecting to subpoenas).

The Copyright Owners instead made an end-run around these discovery rules by obtaining confidential Service information from the MLC through an informal request in *Phonorecords III*. That this information is held by the MLC, rather than the Services themselves, is of no moment. The Copyright Office has imposed restrictions on the MLC's disclosure of confidential information in its possession, codified at 37 C.F.R. § 210.34, which make clear that financial and business information provided by digital services to the MLC cannot be freely obtained by outside parties. The Copyright Owners nevertheless have asserted that 37 C.F.R. § 210.34(c)(4)(iii) is properly read to allow the MLC to provide counsel for a participant in a ratesetting proceeding with confidential Service information without the Copyright Owners having to serve a written discovery request on a participating Service or move for a subpoena to the MLC:

> (4) In addition to the permitted disclosure of Confidential Information in this paragraph (c), the mechanical licensing collective and digital licensee coordinator may disclose Confidential Information to:
> . . .
> (iii) Attorneys and other authorized agents of parties to proceedings before federal courts, the Copyright Office, or the Copyright Royalty Judges, or when such disclosure is required by court order or subpoena, subject to an appropriate protective order or agreement.

37 C.F.R. § 210.34(c)(4)(iii). Indeed, on the Copyright Owners reading of this rule, they could obtain and rely on confidential information of *nonparticipating* services held by the MLC, without any notice to the nonparticipant, the opportunity to object,[4] or the opportunity to review the operative protective order to ensure that its confidential information will be treated appropriately.

The Copyright Owners misread this regulation, which was not intended to authorize the MLC to disclose information outside of standard litigation practice, including as codified in the regulations governing CRB proceedings and in the Federal Rules of Civil Procedure. This provision was adopted in response to proposals made by both the MLC and the Digital Licensee Coordinator ("DLC") in response to the notification of inquiry issued by the Copyright Office soon after the enactment of the Music Modernization Act. The DLC's proposal mirrored the parallel provision governing SoundExchange's treatment of confidential information under the section 112/114 statutory licenses. *Compare* DLC NOI Reply Comments at A-21, https://www.regulations.gov/comment/COLC-2019-0002-0026, *with* 37 C.F.R. § 380.5(c)(4). The MLC, for its part, sought "a limited exception" that would "allow disclosure of such information *in response to court orders, subpoenas or other legal processes*." MLC NOI Initial Comments at 30 (emphasis added), https://www.regulations.gov/comment/COLC-2019-0002-0011. The Office's notice of proposed rulemaking stated that it was proposing a rule consistent with those proposals. *See* 85 Fed. Reg. 22559, 22563 (Apr. 22, 2020) (explaining that the

[4] There could be a number of proper objections a service might have, including that the request goes beyond the scope of the limited discovery permitted in CRB proceedings, where discovery requests must be "directly related to the written direct statement or the written rebuttal statement of that participant." 37 C.F.R. § 351.5(b).

proposed rule was "similar to current rules established for the administration of the section 112/114 licenses").

As the Judges are aware, even though 37 C.F.R. § 380.5(c)(4) similarly directs SoundExchange to "limit access to Confidential Information to . . . [a]ttorneys and other authorized agents of parties to [Webcasting] proceedings," those participants must use the ordinary discovery process to obtain that information. To be sure, SoundExchange *itself* can introduce confidential service information in its possession during CRB ratesetting proceedings. But that is because SoundExchange is itself *a participant* in those proceedings. By contrast, the MLC is statutorily barred from participating in this or any other ratesetting proceeding. 17 U.S.C. § 115(d)(8)(A). The MLC's role is limited to "gather[ing] and provid[ing] financial and other information for the use of a party" to a ratesetting proceeding, subject to "applicable statutory and regulatory provisions and rulings of the Copyright Royalty Judges." *Id.*

Thus, nothing in the Office's confidentiality regulation should be read to create an exception to the CRB's carefully crafted discovery rules.[5] Nor could this regulation prevent the CRB from issuing a specific protective order in this proceeding enforcing the existing procedural requirements on participants before obtaining confidential data from the MLC.

For all the above reasons, the Judges should make clear that a participant seeking confidential information of another participant from the MLC must request that information directly from the participant (rather than through the MLC) via a written discovery request. Alternatively, a participant seeking confidential information from the MLC should be required to

[5] In parallel to this request, the Services plan to contact the Copyright Office to clarify the confidentiality regulation, if required, to make clear that the MLC's provision of information to parties in proceedings before the Copyright Office, federal courts, and the Copyright Royalty Judges must be in accordance with applicable discovery rules.

move the Judges to issue a subpoena, which would provide the entity whose confidential information is being sought the opportunity to object. The requesting party must also share with the other participants any information acquired from the MLC and cannot be permitted to cherry-pick what it does or does not share.

That said, if the Judges disagree with the Services and find that 37 C.F.R. § 210.34(c)(4) authorizes participants to a ratesetting proceeding to request information from the MLC outside of the normal rules for discovery, the Judges should confirm that all participants—including the Services—have the same right to seek confidential information from the MLC, including publisher information. For instance, the Service participants should be able to obtain from the MLC confidential information about payouts to publishers and the works publishers have registered, without having to seek that information in discovery from the participating Copyright Owners or through a subpoena to the MLC, and without giving those publishers the opportunity to object.[6] Section 210.34(c)(4) applies to "authorized agents of *parties to proceedings* before . . . the Copyright Royalty Judges," not only to the participating Copyright Owners. 37 C.F.R. § 210.34(c)(4) (emphasis added). If the regulation is read to allow dissemination of confidential information in the MLC's possession to participants outside of the CRB's discovery rules, that information must be equally available to all participants.

CONCLUSION

The Services respectfully request that the Judges prohibit the Copyright Owners from relying on 37 C.F.R. § 210.34(c)(4) to circumvent the standard rules of discovery and clarify that

[6] Note that even this will not put the Services and Copyright Owners on equal footing. Given Pryor Cashman's overlapping representation of the MLC and the Copyright Owners, the Copyright Owners will be on immediate notice of any requests made by the service participants to the MLC. At the same time, the service participants will not be given notice of requests the Copyright Owners make to the MLC.

participants must seek information directly from the participant Services through a written discovery request or by moving for a subpoena to obtain information from the MLC. In the alternative, if the Judges find that 37 C.F.R. § 210.34(c)(4) authorizes the participants to obtain confidential information from the MLC by request and without providing notice and an opportunity to object, the Judges should clarify that all "[a]ttorneys and other authorized agents of parties to proceedings before . . . the Copyright Royalty Judges" not only have the same rights to request the information, but that the MLC should produce the requested information to all such "[a]ttorneys and other authorized agents" in the same proceeding. 37 C.F.R. § 210.34(c)(4)(iii).

DATED: August 16, 2021

Respectfully submitted,

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Proof of Delivery

I hereby certify that on Monday, August 16, 2021, I provided a true and correct copy of the Services' Motion for Protective Order to Prevent Circumvention of Discovery Rules with Respect to Data in the Possession of the Mechanical Licensing Collective to the following:

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